

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
November 14, 2008 Session

**PAUL BRADEN v. NANCY STRONG v. EDDIE BRADEN**

**Appeal from the Chancery Court for Lincoln County**  
**No. 11,582 J. B. Cox, Chancellor**

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**No. M2008-00216-COA-R3-CV - Filed February 3, 2009**

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This appeal arises from the dissolution of three partnerships. The matters at issue in this appeal, which is the second appeal of this matter, concern the capital accounts of partners Paul Braden and Nancy Strong, an accounting of Braden Construction, and Nancy Strong's claims of breach of contract and breach of fiduciary duty against Paul Braden. The trial court found, *inter alia*, that Paul Braden was entitled to a capital account adjustment of \$261,361.84 and that Paul Braden was not in breach of contract and he had not breached his fiduciary duty. It also denied Ms. Strong's claim for damages and lost salary and her request to expand the accounting to include the personal accounts of Paul and Eddie Braden. The trial court assessed 51% of the cost of the Braden Construction accounting to Ms. Strong and 49% to Paul Braden. We have determined the evidence preponderates against the capital account adjustments credited to Paul Braden and therefore reverse that determination. The judgment of the trial court is affirmed in all other respects.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed in Part  
and Affirmed in Part**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Donald Capparella, Nashville, Tennessee, for the appellant, Nancy Strong.

R. Whitney Stevens, Jr., Fayetteville, Tennessee, for the appellee, Paul Braden.

Ben P. Lynch, Winchester, Tennessee, for the appellee, Eddie Braden.

**OPINION**

This is the second appeal of a dispute among three former partners arising from the dissolution of three partnerships. The now former partners are Nancy Strong, Paul Braden and Eddie Braden. The three partnerships at issue are Landscaping Concepts, Chicken Creek Farms ("Chicken Creek"), and Braden Construction Company ("Braden Construction").

This action arose when Paul Braden filed a Complaint against Nancy Strong seeking a dissolution of Landscaping Concepts and Chicken Creek, an accounting of the partnerships, and the appointment of a receiver to wind up the businesses. Nancy Strong filed an Answer and a counter-claim seeking the dissolution of Landscaping Concepts, Chicken Creek, and a third partnership, Braden Construction, as well as an accounting and damages for breach of contract and breach of fiduciary duty against Paul Braden and his brother, Eddie Braden. Eddie Braden, who was a partner in Braden Construction, was subsequently added as a party to the action.

At the conclusion of the first trial in this case, the trial court ordered: (1) that the two partnerships be dissolved, (2) that the assets be divided forty-nine percent (49%) to Paul Braden and fifty-one percent (51%) to Nancy Strong, (3) that Paul Braden be awarded capital account adjustments, and that capital account adjustments be denied in part, and awarded in part for Nancy Strong, (4) that the construction business was an implied partnership, and (5) that the construction partnership be dissolved and assets divided twenty-five percent (25%) to Paul Braden, twenty-five percent (25%) to Nancy Strong, and fifty percent (50%) to Eddie Braden. That decision was appealed in 2004. *See Braden v. Strong*, No. M2004-02369-COA-R3-CV, 2006 WL 369274 (Tenn. Ct. App. Feb. 16, 2006).

In the first appeal of this dispute, this court ruled as follows:

The order of the trial court is affirmed as to the finding that the construction business was an implied partnership, that this partnership be dissolved and assets divided twenty-five percent (25%) to [Paul Braden], twenty-five percent (25%) to [Nancy Strong], and fifty percent (50%) to [Eddie Braden], and as to the dissolution of the remaining two partnerships effective January 12, 2004. . . . The trial court's order is, in all other aspects, reversed and remanded for consideration of capital account adjustments for [Paul Braden and Nancy Strong], for a complete accounting of the construction business, Braden Construction/Braden LLC, and for consideration of [Nancy Strong's] claims of breach of contract and breach of fiduciary duty for [Paul Braden's] exclusion of [Nancy Strong] from the Landscaping Concepts partnership.

*Id.*, at \*1.

Accordingly, on remand the trial court was to consider three things: (1) capital account adjustments for Paul Braden<sup>1</sup>, (2) Ms. Strong's claims for breach of contract and breach of fiduciary duty, and (3) to obtain a complete accounting of Braden Construction. With reference to the capital account adjustments, the trial court was to make a determination of whether consent was given by Ms. Strong to each capital account contribution by Paul Braden. Pursuant to the instructions on remand, the trial court appointed Bryan Bean, CPA, Special Master, who timely performed an accounting of Braden Construction, which was filed with the trial court.

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<sup>1</sup>Ms. Strong waived any capital account adjustments in her favor by a Notice of Withdrawal of Nancy Strong's Contingent Claim of Capital Credits filed July 17, 2007.

As requested in this court's 2006 opinion, the trial court conducted hearings to decide the issues remanded to the trial court.<sup>2</sup> Following several hearings on the various issues, the trial court approved the accounting of Mr. Bean, found that "although Nancy Strong did not expressly consent to capital contributions made by Paul Braden or the resulting entitlement to capital credit adjustments in the Landscaping Concepts Partnership, she impliedly did so," and determined that Paul Braden was entitled to an increase in his capital accounts of \$261,361.84. After considering Ms. Strong's breach of contract and breach of fiduciary claims on remand, the trial court found that Paul Braden was not guilty of breach of contract or breach of fiduciary duty for misappropriation of funds and business opportunities and denied Ms. Strong's claims for damages and lost salary. This appeal followed.

### ANALYSIS

Ms. Strong presents three issues on appeal: (1) whether the evidence preponderates against the trial court's award of a capital account adjustment to Paul Braden on the grounds of consent; (2) whether the trial court erred in refusing to grant an expanded accounting and in failing to find a breach of fiduciary duty and breach of contract; and (3) whether the trial court abused its discretion in ordering Ms. Strong to pay for 51% of the cost of the accounting. We will address each issue in turn.

#### CAPITAL ACCOUNT ADJUSTMENTS

The issue concerning the capital accounts of Paul Braden and Nancy Strong hinges on the determination of whether Ms. Strong consented to capital contributions by Paul Braden, and if so, the amount of the capital contributions to which she consented.

The trial court found that Ms. Strong "did not expressly consent to capital contributions made by Paul Braden or the resulting entitlement to capital credit adjustments in the Landscaping Concepts Partnership, she impliedly did so and Paul Braden is entitled to capital credit adjustments in the sum of \$261,361.84 . . . ." The issue and the court's ruling was explained from the bench as follows:

The question is not one of express consent, and I think we've already dealt with that, but to the extent we haven't, I want to articulate that on the record. The court's finding is that the parties didn't talk about it. There is no express consent. . . . Then the question is does the record bear a preponderance of the evidence that implied consent occurred to the capital contributions. Yes, it does. And it's as simple and complicated as the money had to come from somewhere.

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<sup>2</sup> At the beginning of the hearing concerning the issues of capital accounts and Ms. Strong's consent or lack thereof, which was held on November 28, 2007, Ms. Strong requested that she be allowed to submit additional proof on the issue of capital credits and consent, which the trial court denied. Ms. Strong made an offer of proof as to the capital credits and consent, which included the deposition of Paul Braden. At the close of her offer of proof, the trial court reversed its previous ruling excluding all new evidence, thereby allowing into evidence all of the testimony and exhibits contained in Ms. Strong's offer of proof.

The trial court made a finding that Ms. Strong impliedly consented to treating Paul Braden's infusion of cash as capital contributions, but the court did not state any facts upon which it based this finding. Instead, the court reasoned that the money had to come from somewhere and Paul Braden provided it. We agree that he provided the money; however, we find no basis upon which to conclude that the mere infusion of cash into a business should be deemed a capital contribution.

The record fully supports the trial court's finding that there was no express consent by Ms. Strong to any capital contributions in Landscaping Concepts by Paul Braden; however, we find no evidence to support a finding of implied consent by Ms. Strong to a change in the partners' respective capital accounts. Ms. Strong and Paul Braden both testified that they never discussed changes in the capital accounts or altering the express percentages outlined in the partnership agreement. Further, neither of the partners discussed changes in the capital accounts with the partnership's accountant and, thus, no changes were made as Landscaping Concepts' partnership tax returns were filed annually. Conversely, capital contributions in Braden Construction were discussed among the partners and the balances remained current on federal income tax returns, which circumstance we find most significant.

The partnership federal tax returns reveal that the percentage of ownership in Landscaping Concepts between Ms. Strong and Paul Braden never changed from 1997 through 2002. Even in 2005, the tax returns of Landscaping Concepts, which were prepared after Paul Braden had made a claim for capital account adjustments, listed Ms. Strong's capital account contribution at 51% and Paul Braden's capital account contribution at 49%. In fact, Paul Braden's list of proposed credits to his capital contributions was not prepared contemporaneously with the transactions; instead, it was prepared subsequently for purposes of this litigation.

The trial court appears to have based the finding of implied consent on the explanation that "the money had to come from somewhere." It is undisputed that Paul Braden contributed money to keep Landscaping Concepts afloat for a period of time. That fact alone, however, does not provide evidence that Ms. Strong consented to the contributions being treated as capital contributions; instead, his cash contributions could just as easily have been treated as loans to the partnership.

There is no evidence in the record to support a finding that Ms. Strong consented to any change in the capital accounts of Landscaping Concepts. We, therefore, reverse the award of a capital credit and adjustment to Paul Braden and remand with instructions to reduce Paul Braden's capital account in Landscaping Concepts by \$261,361.84 and to enter a judgment accordingly.

#### EXPANDED ACCOUNTING

As this court requested in the first opinion, the trial court obtained a "complete accounting" of Braden Construction. The accounting of Braden Construction was conducted by Bryan Bean, a certified public accountant, as Special Master. Mr. Bean submitted his accounting to the trial court and, upon the request of Ms. Strong's counsel, the accounting was adopted.

Although the trial court caused a complete accounting of Braden Construction to be performed, Ms. Strong requested an expanded accounting of all of Paul and Eddie Braden's finances, including personal bank accounts. She additionally requested an accounting of a new entity, "Paul Braden Construction Company," which was started by Paul Braden after he filed this action to dissolve Braden Construction Company. The trial court denied Ms. Strong's requests. She now appeals contending the trial court abused its discretion in refusing to expand the accounting to include all of Paul and Eddie Braden's personal accounts and the new entity, Paul Braden Construction Company. We have concluded the trial court did not abuse its discretion by denying Ms. Strong's request to expand the accounting beyond the scope of the three partnerships at issue in this matter.

The abuse of discretion standard does not permit an appellate court to substitute its judgment for that of the trial court. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998)). Pursuant to the abuse of discretion standard, the trial court's ruling will be upheld "so long as reasonable minds can disagree as to propriety of the decision made." *Id.* (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000)). A trial court abuses its discretion if it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. *Id.* (citing *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)).

In addition to obtaining a complete accounting of Braden Construction, at the request of Ms. Strong, the trial court permitted Mr. Bean to investigate further into transactions that were considered questionable, which was done. As Mr. Bean testified, he did "more than just an accounting when we went into the deposits and the contracts the way we did." The matters at issue pertain to Landscaping Concepts, Chicken Creek Farms and Braden Construction Company and the partners' respective rights and responsibilities therein. The trial court required a complete accounting of Braden Construction, as requested by the parties and this court, and the parties have had several years to obtain the discovery they deemed appropriate. Realizing the decision was within the discretion of the trial court and the very deferential standard by which we review such decisions, we find no error with the trial court's decision to deny Ms. Strong's request to expand the accounting beyond the scope of the matters at issue in this action. Accordingly, we affirm the decision denying Ms. Strong's request for an expanded accounting.

#### BREACH OF CONTRACT AND BREACH OF FIDUCIARY DUTY

Ms. Strong also contends that the trial court erred in "failing to find a breach of fiduciary duty and breach of contract, where (1) partnership funds were wrongfully diverted, (2) clients of Braden Construction were wrongfully diverted to Paul Braden Construction, and (3) Nancy Strong's salary was wrongfully terminated." The trial court found the evidence insufficient to find that Paul Braden diverted partnership funds wrongfully, that clients of the partnership were wrongfully diverted, and that Ms. Strong's salary was wrongfully terminated. We have examined the record and have concluded that the evidence does not preponderate against these findings; therefore, Ms. Strong's claims against Paul Braden for breach of fiduciary duty and breach of contract must fail.

### COST OF THE ACCOUNTING

Lastly, Ms. Strong contends that the trial court abused its discretion in ordering her to pay 51% of the cost of the accounting. The assessment of costs is within the discretion of the trial court and as was the case above, we review such a decision pursuant to the abuse of discretion standard which does not permit us to substitute our judgment for that of the trial court. *Eldridge*, 42 S.W.3d at 85; *Myint*, 970 S.W.2d at 927. Realizing that the matters in dispute were for all practical purposes between Ms. Strong and Paul Braden, with Eddie Braden essentially being a bystander, and realizing that Ms. Strong owned 51% and Paul Braden owned 49% of the capital accounts at issue, we find no error with the trial court's determination that Ms. Strong should be responsible for 51% of the cost of the accounting. Accordingly, we affirm the assessment of this expense by the trial court.

### **IN CONCLUSION**

The judgment of the trial court is affirmed in part, reversed in part, and this matter is remanded for further proceedings consistent with this opinion. Costs of this appeal are assessed against Nancy Strong and Paul Braden, equally.

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FRANK G. CLEMENT, JR., JUDGE